IN THE

Supreme Court of the Unit

October Term, 1989

GREGORY SCARPA, JR.

against

UNITED STATES OF AMER

PETITION FOR A WRIT OF CER
THE UNITED STATES COURT O
FOR THE SECOND CIR

STEVEN
Attor

Questions Presented

1. Whether the Sixth Amendment right t
lated when government agents deliberately elic
statements from an indicted defendant under
conversation while that defendant was being tra
mobile from the town where he was arrested to
court, more than seven hours after his bei
Miranda rights, which he did not expressly w
same attorney who the defendant said would b
had already contacted the United States Atto
assured that the defendant would not be ques

2. Whether an indicted defendant may
knowingly, voluntarily and intelligently waive
Sixth Amendment right to counsel in the abs
oral or written statement that he affirmatively

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IN THE

Supreme Court of The U

October Term, 1989

GREGORY SCARPA,

–against–

UNITED STATES OF A

PETITION FOR A WRIT OF C
THE UNITED STATES COURT
FOR THE SECOND CI

The Petitioner respectfully prays fo
review the judgment of the United States
Second Circuit entered in the above-capt
23, 1990.

DECISIONS BELO

The judgment of the United States
Second Circuit, *United States of Americ*
897 F.2d 63 (2d Cir. 1990), as well as th
based, are appended hereto as Appendi

CONSTITUTIONAL PRO

Amendment VI of the Unite

"In all criminal prosecu
the right to a speedy and pub
the State and district wherein
mitted, which district shall ha
by law, and to be informed of
cusation; to be confronted wi
have compulsory process for
vor, and to have the Assistan

STATEMENT O

The following statement of th
ion of the Court of Appeals for the
pp. 3a, 6a-8a), with the accompa
taken from the briefs and appendi

"Scarpa was named with
dictment filed on November 2
involving an organized mariju
the use of murder and extortio
superseding indictments wer
1987 and the second on Januar
Scarpa was named as the leade
juana and extortion enterprise
dants worked in different capa

however, fled the jurisdiction, beca
apprehended until eight months l
rately, following his arrest by DE
Lakewood, New Jersey on August

* * *

Scarpa was arrested by agents
Administration at a motel in Lake
proximately 2:00 a.m. on August 29
negotiations during which Scarpa
Upon arrest, DEA Special Agen
Scarpa of his *Miranda* rights, but
stating: 'I understand my rights, y
Despite Scarpa's statement Gilbrid
rights, and then asked Scarpa if he
Scarpa said he did.

Gilbride put on a hat, pointed
vision show 'America's Most Wan
had seen the show.[2] Scarpa, who
show, laughed and said he had seen
fied that, when asked if he had an
that he didn't have a lawyer, that he
But he didn't know the guy's name
ther and asked Scarpa if he knew th
replied that he 'didn't know the gu

waive his right to remain silen
interrogate him. At 3:00 a
Lakewood Township Jail, and
tion with Gilbride at that tim

The next morning, Gilbri
Marshal took Scarpa to the f
New Jersey. Sometime before
house, Joseph Benfante, a law
Scarpa's family, telephoned th
torney in charge of the Camd
ances that Scarpa would not
the AUSA discussed Scarpa's
a stipulation waiving extraditi
spoke with the United States
and Trenton. He subsequent
and on this appeal.

The car Gilbride was dr
and the Marshal did not have a
nor Scarpa knew that Benf
Scarpa's family or that he had
Attorney's office. In what the
laxed and friendly' conversatio
about Scarpa's life as a fugitiv
dants during the two-hour ride
380. Scarpa repeatedly asked
him up, but he never asked fo

In the midst of this ongoing co
statements which he later sought t
court [footnote in original omitte
mented that he did not think Scarp
this long, Scarpa said that he woul
three days had he not been caught.
in Florida but came to New Jersey
Florida.

Gilbride asked if Scarpa thou
at him because 'they had to [go to]
said no, 'my friends aren't like that
fact, Scarpa said, he was visited by
co-defendants, when Meli was un
Gilbride commented that it had
said that Nunzio DeCarlo, who had
sations with Leon and police office
lem because he talked too much.'
heard the tapes, he said he had beer
was kept informed during the trial
that co-defendants Mario Parlagr
were 'stand-up guy[s].' "

The District Judge denied the mo
that Scarpa had not invoked his right to
6b-8b), and that Mr. Benfante's interve
of which Scarpa was unaware, was of

The Decision of the Court

The Court of Appeals unanimously
the District Court. In its opinion, the
that even in the absence of an express w
of circumstances" test of *North Carolin*
373 (1979), Scarpa knowingly and volu
Amendment right to counsel (Appen
Court also discounted Mr. Benfante'
Scarpa would not be questioned by go
his return to New York. It held that "an
defendant may [not] invoke the defen
prevent the defendant from waiving the
Finally, the Court held that Scarpa's st
retaining a particular attorney (Benfan
of a request for counsel at that time. (

REASONS FOR GRANTIN

**THE DECISION BELOW H
INDICTED DEFENDANT MAY, BY
HIS SIXTH AMENDMENT RIGHT
ABSENCE OF COUNSEL, AFT
RETAINED TO REPRESENT H
RECEIVED ASSURANCES FRO
PROSECUTOR THAT NO QUE**

or mentioned an attorney at the time that he ex
written waiver of his *Miranda* rights, and volu
statement in the face of what he knew to be for
gation. *Id.*, at 2392-2393, n.3.

Although the Court ruled that the advis
rights would support a finding that an express
to counsel was "knowing and intelligent" under
Sixth Amendments, it nonetheless observed th
tutional "prophylactic" right to counsel desi
Fifth Amendment protections under *Miranda*
Harvey, ___ U.S. ___ , 58 USLW 4288, 4289 [
Quarles, 467 U.S. 649, 654 [1984]; *Edwards* v.
477, 492 [1981] [Powell, J., concurring]) was no
all purposes with the "fundamental" constituti
sel (see *Gideon* v. *Wainwright*, 372 U.S. 335, 344
Zerbst, 304 U.S. 458, 462-463 [1938]; *see also M*
475 U.S. 625, 632 [1986]) guaranteed by the S

> This does not mean, of course, that
> ment challenges to the conduct of postin
> ing will fail whenever the challenged pr
> constitutional muster under *Miranda*. *Fo*
> *permitted a Miranda waiver to stand wher*
> *told that his lawyer was trying to reach him*

> a 'medium' between [the accuse
> beyond *Miranda's* protection of
> to counsel, see *Maine* v. *Moulton*
> be cases where a waiver which w
> will not suffice for Sixth Amen
> *Michigan* v. *Jackson*, 475 U.S., a

Patterson v. *Illinois*, *supra*, 108 S.C
added). This is such a case.

The petitioner here, unlike the
not expressly waive his Sixth Amen
submit to what was undisguised f
Rather, the Court of Appeals conclu
waived his constitutional right to cou
given his *Miranda* rights, when he sp
during the two-hour automobile trip
which he was arrested to the district
sey, where he was to be processed fo
District of New York, the situs of t
The highly incriminating statements
festly, deliberately elicited by the
Kuhlmann v. *Wilson*, 477 U.S. 436, 45
ton, 474 U.S. 159, 173-174 [1985]) un
provocative, government-initiated co

United States Attorney in Camden, New Jer
surances that petitioner would not be quest

This case, therefore, squarely presents f
important Sixth Amendment issues that th
rectly ruled upon previously. A grant of certi
mit the Court to provide critically-needed g
courts, prosecutors, defense attorneys and p
nation with respect to the following substant
tutional concerns: (1) the proper parameters
lice-initiated interrogation of a defend
instrument, when he is no longer a mere su
accused party in a pending criminal action,
the full protection of the Sixth Amendment
tance of counsel; (2) the extent to which an a
retained by an accused or his family to rep
against the extant formal accusation must b
vene and serve exclusively as the "medium" t
fendant deals with the government and the j
criminal action that has already commenced
the context of the Sixth Amendment, the gov
its heavy burden of establishing a formally
waiver of the fundamental constitutional rig
satisfying a bright-line rule that the defend
firmatively waive that essential constitution

(1) *The need to establish parameters for p*

fine margin, that following the fil
may properly interrogate an accus
mal questioning, provided that th
prised of his constitutional
relinquished them knowingly and
v. *Illinois, supra.* At the opposite
cases that prohibits post-accusat
forts to "deliberately elicit" incrim
cused by jailhouse informants o
rule obtains regardless of whethe
tually retained counsel or express
counsel. *See, e.g., Maine* v. *Mo*
States, 377 U.S. 201(1964). Furth
fendant asserts the right to couns
gation or for any other purpose
cease, unless there is a subsequen
Amendment right. See, e.g., *Mic*
at 636; see also, *Brewer* v. *Willia*

Petitioner's case falls somew
polar extremes, although it is in s
liams, supra. Indisputably, petit
charges, and his Sixth Amendm
tached when he made the incri
automobile journey. It is true t
counsel when he was advised of

to coax, i.e., "deliberately elicit," incrimi
him without his being aware that he was
ment agents with future trial evidence aga
agents were bent on goading petitioner
statements may be found in the fact that h
seemingly innocuous questions about h
were alleged in the indictment to be worl
The statements that petitioner made wer
tion at trial to establish his role at the hea

This Court has observed that before
proceedings, there exists a strong public p
interrogation of arrested suspects, it bein
compelling interest in finding, convicting
who violate the law." *Moran* v. *Burbine*, 4
However, upon the commencement of ac
this calculus changes.

> "Indeed, after a formal accusation h
> person who had previously been just
> the 'accused' within the meaning of th
> the constitutional right to the assistan
> importance that the police may no lon
> for soliciting information from an u
> that might have been entirely prope
> their investigation."

Michigan v. *Jackson*, *supra*, 475 U.S., at 63

gated without counsel after an atto
tempted to intervene in the proceed
of his representation of the accuse

This case presents the Court
side of *Moran* v. *Burbine*, *supra*.
108 S.Ct., 2397, n.9. In *Moran*,
Amendment and the *Miranda* rule
waive his prophylactic, non-cons
spite his not being told that an att
ber had been trying to reach hi
stated that "[b]ecause neither th
require this additional handicap
tigatory efforts, we are unwilling
require the police to keep the sus
legal representation." *Id.*, at 427

In reaching this conclusion,
that the defendant there lacked
counsel, which would have entai
428-429. Subsequently, this Cour
analysis and result would have p
been a post-indictment, Sixth Am
nois, *supra*, 108 S. Ct., at 2397, n

The Court should take this

here, the attorney was retained by the ac
than by petitioner himself. This significant
plainly ripe for resolution upon the facts

(3) *The previously unresolved question*
be a bright-line rule that to establish a va
Amendment right to counsel, the Governm
that the accused expressly and affirmatively
tal constitutional liberty.

In recent years, the Court has recogni
cietal benefit of establishing bright-line ru
tions concerning a defendant's waiver o
Amendment rights to remain silent, and to
Edwards v. *Arizona*, *supra*, 541 U.S., at 646
supra, 475 U.S., at 634, 636. This case pres
opportunity to resolve a question previou
the Court—whether to add to the safegu
cused's fundamental constitutional right
Sixth Amendment by establishing a brigh
surrender of that right by an accused wi
there has been an express, affirmative wa

In *North Carolina* v. *Butler*, 441 U.S.
ing with waiver of the Fifth Amendmen
prophylactic right to counsel under *Miran*
Court ruled that an express waiver was un

at 374, under *Miranda*'s prophyla
ler, supra, 441 U.S., 376-377. Ab
decision of the North Carolina
sustained.

Thus the question remains
mental constitutional right to c
ment may be found only when
waiver of that right by the accu
U.S. 506, 516 (1962) and *Johnso*
decided in the present case.

CONCL

For the foregoing reasons
tiorari should be granted.

Re

Ste
KA
23
Ne
At

APPENDICES

APPENDIX

Opinion of the United States

UNITED STATES COUR

FOR THE SECOND C

No. 303—August Te

(Argued October 30, 1989 D

Docket No. 89-

UNITED STATES OF

—against—

GREGORY SCARI

Before:

OAKES, *Chief Justice*
MINER and MAHONEY,

JOSEPH R. BENFANTE, New Yo
New York, NY, of counsel), *f*

JEROME C. ROTH, Assistant
Brooklyn, NY (Andrew J. M
torney for the Eastern Distri
E. Fishbein, Assistant Unite
lyn, NY, of counsel), *for App*

MINER, *Circuit Judge:*

Gregory Scarpa, Jr., appeals from
entered on February 27, 1989, after a
States District Court for the Easter
(Glasser, *J.*). Defendant was found guil
eering enterprise in violation of the F
Corrupt Organizations Act ("RICO"),
engaging in a continuing criminal ent
U.S.C. § 848(a) (1982 & Supp. V 1987)
marijuana in violation of 21 U.S.C. §
marijuana in violation of 21 U.S.C. §
counts of conspiring to commit extortio

of the Drug Enforcement Administration ("D
States v. *Scarpa*, 701 F. Supp. 379 (E.D.N.Y. 198
that the district court erred in refusing to permi
recordings made by law enforcement authoriti
microphone, which the government contends
court found, reveal neither incriminating no
dence relevant to his case.

For the reasons that follow, we affirm.

BACKGROUND

Scarpa was named with eight co-defendant
filed on November 2, 1987, charging various cr
organized marijuana distribution business, and
and extortion to advance their goals. Two su
ments were filed, one on December 14, 1987 a
January 27, 1988. In each indictment, Scarpa
leader of the "Scarpa Crew," a marijuana an
prise in which each of his co-defendants worke
pacities selling marijuana at the College of S
several other locations in Staten Island and Bro
ments alleged also that Scarpa participated in
in one instance, the murder of rival drug deale

The eight co-defendants were tried jointly

phone numbers when he was arre
Granato, Mario Parlagreco and Nur
ported to Scarpa, worked with Crew
where marijuana was sold. Christ
two cooperating witnesses who ha
Crew, testified that Scarpa had spok
had acknowledged to them that he
juana business, and that other co-de
Scarpa as such.

Gaeta testified to a meeting wit
outside the Wimpy Boys Club, a s
Crew members congregated. He als
luncheonette and Mike's Candy
Granato to give Gaeta a marijua
Brooklyn. Granato gave Gaeta the s
was the boss of the Crew and a "wise
mean a member of the Mafia. Gaet
selling marijuana for the Crew, Sca
Crew marijuana dealers from whom
payments using threats and violenc

Leon started as a dealer of mar
eventually was made manager of th
involvement in the marijuana busin

working at the College spot for free. Leon re spot and paid off some of his debt. On Fe ever, he was told to go to Mike's Candy Sto and greeted him, but soon left. Granato gav told him he had fifteen minutes to raise $1 that Scarpa told him not to let Leon leav money was paid. After a few minutes of tau bers, he was beaten with a baseball bat and tion for a broken arm and other injuries.

Testimony of the cooperating witnesses testimony of police officers who had observ workers at the College spot, as well as by Scarpa with the co-defendants. Videotap showed Scarpa wearing a beeper and talkin fendants outside the Wimpy Boys Club. Th tablished that Scarpa had substantial in source, although Scarpa contends that the not drugs.

The jury also heard tape recordings m agent of conversations with DeCarlo, who bribery in violation of N.Y. Penal Law § 200 DeCarlo said on the tapes that he reporte and that his "bosses" were aware of the pa

error. We note that Scarpa make
the evidentiary rulings, the evide
his conviction.

1. Scarpa's Statements to

Scarpa was arrested by agent
ministration at a motel in Lake
mately 2:00 a.m. on August 2
negotiations during which Scarp
Upon arrest, DEA Special Agent
of his *Miranda* rights, but Scarpa
derstand my rights, you don't ha
statement, Gilbride completed t
asked Scarpa if he understood th

Gilbride put on a hat, pointe
show "America's Most Wanted,"
the show. Scarpa, who had been
and said he had seen the show.
asked if he had an attorney, Scarp
lawyer, that he was going to get a
guy's name." Gilbride inquired
knew the lawyer's name. Scarpa
guy's name but he's the guy that
the cop's ear off." Gilbride testifi

Scarpa's arraignment in New York and a
tradition proceedings. Benfante also s
States Marshal's offices in Camden and
quently represented Scarpa at trial and o

The car Gilbride was driving to Camd
Marshal did not have a radio. Thus, neith
knew that Benfante had been retained by
he had contacted the United States Attorn
district court found to be a "relaxed and
Gilbride and Scarpa talked about Scarpa
the trial of his co-defendants during the
den. 701 F. Supp. at 380. Scarpa repeat
reveal who gave him up, but he never ask
never told Gilbride that he did not want

In the midst of this ongoing conve
statements which he later sought to su
court.[1] When Gilbride commented that h
would be a fugitive for this long, Scarpa s
left New Jersey in three days had he not be
he had been in Florida but came to New
"too hot" in Florida.

Gilbride asked if Scarpa thought his f
because "they had to [go to] trial, you di
"my friends aren't like that. They're good

father. Scarpa said that co-defendar
Kevin Granato were "stand-up guy[s]

2. The Wimpy Boys Tapes

The government introduced evider
defendants met regularly on the side
Boys Club. The evidence included sile
graphs and testimony by undercover o
surveillance of the Club. The only evid
Club suggested that drugs never were c
tified that the one time he mentioned
walked away from him and Granato
bring up the topic in the Club again.
was told to stay away from the Club an
Scarpa.

Prior to the trial of the co-defend
Attorney's Office informed the governi
electronic surveillance in the Club ov
1986, and that it had tapes of convers
sion between the government and the
indicated that Scarpa's voice probably
ernment examined the tapes and prepa

involve[d] criminality that has nothing to
charged in this case."

DISCUSSION

I. Scarpa's Statements to Agent Gilbride

The fifth amendment guarantees that "n
compelled in any criminal case to be a witne
U.S. Const. amend. V. Having been indicted,
also to the sixth amendment right "to hav
Counsel for his defense," *id.* amend. VI, whi
to have counsel present at any postindictm
the government. *Maine* v. *Moulton*, 474 U.S.
siah v. *United States*, 377 U.S. 201, 206 (1964)
waived, with the burden on the government t
derance of evidence that any waiver was kno
North Carolina v. *Butler*, 441 U.S. 369, 373
Twomey, 404 U.S. 477, 489 (1972); *United State*
805, 809 (2d Cir. 1984). This standard for fi
same under the fifth and sixth amendments.
108 S. Ct. 2389, 2395 (1988).

The district court found that Scarpa "k
tarily waived those rights and that the governm
yond a reasonable doubt." 701 F. Supp. at 38
found also that Scarpa had not requested co

436 (1966). Upon his arrest, Sca
of his rights, indeed interrupted
rights, to indicate both his famil
nation to make his own decision
questioning occurred during a t
laxed and friendly." This follow
proximately six hours. There are
psychological deprivations. *See*
28, 30 (2d Cir. 1987). Thus, the
tion, coercion or deception." *Se*
421 (1986).

Viewing the "totality of th
Scarpa waived his constitution
both of the nature of the right
quences of the decision to aband
ing questions after *Miranda* wa
necessarily constitute a waiver,
required. *Butler*, 441 U.S. at 37
146, 152 (2d Cir. 1983); *United St*
(2d Cir. 1974), *cert. denied*, 421
some cases waiver can be clear
words of the person interrogat
(quoting *Butler*, 441 U.S. at 373

U.S. 387, 404 (1977) (defendant's "cons advice of counsel in dealing with the au gestion that he waived that right"). Whe DEA agents, he negotiated with the ag he remained in the motel room with his made no effort to contact an attorney o an attorney in his behalf. *Compare Bur* fendant "was left in a room where he h which he apparently declined to use") *a* (defendant had opportunity to ask mot his behalf) *with United States* v *Lilla*, (N.D.N.Y. 1982) (defendant "specifica counsel by requesting his mother to re phone"), *aff'd in part and rev'd in part on* (2d Cir. 1983). Scarpa's step-mother n own initiative and without his knowled

Scarpa was not a tyro in these ma worked with lawyers, retaining several to the marijuana operation. *See Isom*, 58 waiver not clearly erroneous when "app derstanding of his rights as they were waiver of rights form, and had had rath perience with law enforcement officers"

formed that an attorney retained
person has asked that the defen
(defendant questioned less th
promised otherwise to attorney
"Events occurring outside the
tirely unknown to him surely ca
to comprehend and knowingly
Id. at 422. *Miranda* warnings ar
know what a lawyer could 'do fo
questioning: namely advise [the
ing any such statements." *Pat*
Terry, 862 F.2d at 412.

Both *Patterson* and *Burbi*
amendment attaches, "the poli
forts of a defendant's attorney to
suspect] and the State' during
U.S. at 428 (quoting *Moulton*, 47
108 S. Ct. at 2397 n.9 (waiver ma
context "where a suspect was no
reach him during questioning").
retained, or even expressed a de
affirmative obligation to respe
choice to seek this assistance."
established that a defendant do
in order to be entitled to one.

request is construed broadly to include prosecution." *Jackson*, 475 U.S. at 63 counsel when he stated that he would ge other indication that he doubted his a ernment agents on his own. Scarpa's co the law and determination are in no wa cal statements in *Gotay*, where the defen n't afford a lawyer [and] that she was co lawyer." 844 F.2d at 976. Scarpa knew knew that he wanted one at a later time information out of Gilbride. His menti not automatically mean that Gilbride ha *Gotay*, 844 F.2d at 975 (rejecting appro cease "as soon as the word or concept

Significantly, while this court hel tion must cease "when a suspect make that arguably can be construed as a *requ* mined that the defendant's initial refusa of a co-defendant was not a request for interrogation following that refusal. *Id.* The circumstances in *Gotay* indicated afraid to speak in front of her co-defe

Here, the circumstances reveal a who knew whether and when he wanted that the district court, "supported by hi

" '[D]eterminations of relevanc
cretion of the trial judge, and h
unless he has acted arbitrarily
Diaz, 878 F.2d 608, 614 (2d Ci
Cruz, 797 F.2d 90, 95 (2d Cir. 1
(1989).

Scarpa contends that the
ments on the tapes is relevant in
the government's theory that th
Wimpy Boys Club to discuss
contends also that the tapes wou
illicit income came from gambl

A defendant may not seek
ever, through proof of the absen
casions. *See United States* v. *O*
1978); *United States* v. *Shapiro*,
aff'd, 335 U.S. 1 (1948); *see also*
(Tillers rev. 1983). The district
tained conversations which wer
volve[d] criminality that has
charged in this case." The abse
sistent with testimony by the
were never discussed inside the
propriately refused to order dis
States v. *McElroy*, 697 F.2d 459

APPENDIX

Memorandum an

UNITED STATES DIST
E.D. NEW YO

UNITED STATES OF

v.

GREGORY SCAR

No. CR-87-760

Dec. 2, 198

GLASSER, District Judge:

Following a hearing on the defe

28). Notwithstanding that assertion, Gilbride all of his *Miranda* rights which Scarpa said h

At about that point, Agent Gilbride put was printed "America's Most Wanted." Scar began to laugh. Gilbride asked Scarpa if he ha Scarpa replied the he didn't have one; that he lawyer whose name he didn't know but that he yer who defended Billy Meli in the case in whic with biting off a policeman's ear. (Billy Meli is fendant who was tried and convicted together defendants). Scarpa was then transported Township jail where he was lodged for the nigh 3:00 a.m.

Later that morning Gilbride and a Dep transported Scarpa from Lakewood to the Fed Camden, New Jersey, where he was arraigned. pute about the exact time at which Scarpa was Lakewood jail. Agent Gilbride testified that t for Camden at 9:00 a.m. Deputy U.S. Mar Cama, testified to the same effect. Records of lice presented by the defendant reflect that t approximately one hour and a half later. A Marshal Cama impressed the court as being fa

den which took approximately two hours. The car were riding was not equipped with a radio and th dence that the U.S. Attorney could have communica vehicle in any way. During that trip Scarpa and versed about a variety of things. Gilbride remarked think Scarpa would be a fugitive as long as he was to replied that if he hadn't been apprehended he was leaving in three days.

Gilbride made the observation that Scarpa loo than he did on the television program "Americas M Scarpa laughed and said the show was inaccurate him as smoking Marlboro cigarettes and drinking scotch. He saw the show while he was in Florida an Jersey shortly thereafter because he believed he wa Florida. The ensuing conversation which continue and friendly manner touched upon whether his frien with him because they went to trial while he was a fug said that they weren't—that "they aren't those type wouldn't be mad at me." Scarpa also indicated that a fugitive he was visited by Billy Meli even though M house arrest at the time.

Gilbride commented on the length of the trial fendants which Scarpa acknowledged and said "Nic

Gilbride to reveal who gave him up. At
hour drive from Lakewood to Camden did
have an attorney present and he neve
Gilbride in any way that he did not want to
dant's motion to suppress all the statemen
ing his arrest is denied for the reasons th

Relying upon *United States* v. *Mohabi*
1980) the defendant contends that the *Mir*
him were insufficient to waive his post-in
ment right to be represented by counsel
Mohabir held that before an indicted defe
gated he was to be taken before a neutr
would advise him of his rights and explain
of his right to remain silent and of his rig
attorney should he decide to speak to the g
charges were lodged against him. Althou
that this additional safeguard was not re
tion it imposed it nevertheless in the exe
power, believing that

> [T]he government has a "heavy burde
> of Sixth Amendment rights by an i
> that burden cannot be discharged unl
> is satisfied than that met by merely sh

> purpose that an attorney serves when the
> tioned by authorities. With respect to this i
> discern a substantial difference between th
> lawyer to a suspect during custodial interr
> value to an accused at post-indictment que

108 S.Ct. at 2398. Any doubt that may have li
continued efficacy of *Mohabir* was laid to rest by
servation by the Court:

> As have a majority of the Courts of Ap
> *Mohabir's* holding that some "additional"
> cussions with an accused are required in
> that any waiver in this context can only prop
> fore a "neutral . . . judicial officer."

108 S.Ct. at 2396-97, f.n. 8.

All other things being equal, the court wou
Scarpa had been fully informed of his *Miranda* r
knowingly and voluntarily waived those rights a
ernment proved that beyond a reasonable doubt
ponderance of evidence is the standard of proo
The defendant also contends, however, that *Pa*
standing, his statements must be suppressed

To begin with, Scarpa's statement co
biguous, neither could it be deemed equ
the words he spoke is exquisitely clear. It
futility to attempt to convey the meaning
simply repeating them. To invoke the ho
words would be no less than to endow t
talismanic qualities" *Nash* v. *Estelle*, 597
which this circuit has abjured. *Gotay*, 84
termined that the defendant did not expre
cate with the government only through
requested and that his statement was
equivocal, the question is whether an exp
in the future invokes the rule of *Edwards*
that it does not.

Reference has already been made to
dowing the word "lawyer" with talisman
telle, supra. Another Fifth Circuit case,
747 F.2d 945 (5th Cir.1984) expressed it
page 945: "A defendant does not invoke
time the word falls from his lips." Aft
words spoken by Jardina never asked th
the ongoing questioning and that he wis
out a cooperative deal with the govern

erence to a trenchant analysis of this and r
Tomkowicz, *Standards for Invocation and Wai*
Confession Contexts, 71 Iowa L.Rev. 975 (1986) (
pages 1012-13, the author writes:

> To invoke the protection of fifth or sixth am
> in confession contexts, any conduct that a r
> would conclude is more likely than not ar
> present desire for counsel ought to suffice.
> like all others, harbors risks. Nevertheless,
> rival interests and is grounded in the belief
> objectives should be diminishing the risk
> self-incrimination and imbalanced adve
> without excessively restricting official auth
>
> Several facets of the proposed test merit
> First, for conduct to qualify as a valid requ
> must be "more likely than not" that the co
> tion.... By excluding unlikely assertions, th
> suspects that probably does no express a ne
> benchmark will limit the constriction of inv
> ity. The prescribed level should not adm
> deserving actions into the invocation c
> standard does err slightly on the side of ove
> tious preservation of constitutional values
> Second, the standard prescribes evaluatio

> adequately, and should not be p
> vulnerability to governmental pr
> immediate need for aid. It is onl
> ability and need that justify the
> that follows invocations.

(footnotes omitted).

Having concluded that the def
unequivocally expressed only a *future*
scription of *Edwards* v. *Arizona* has

The defendant also contends t
him after Mr. Joseph Benfante sp
United States Attorney in Camden,
pressed. Since the record indicates t
tion occurred at approximately
contends, should be all statements m
drive from Lakewood to Camden v
11:00 a.m., approximately. It is not c
had no knowledge of the communic
and the United States Attorney, nor
dant had no knowledge that Mr. Be
on his behalf. It is also not disputed

> . . . Sixth Amendment principles requ
> State's knowledge from one state act
> Sixth Amendment concerns the con
> State and the individual. One set of s
> may not claim ignorance of defendan
> for counsel to another state actor (th

(footnotes omitted). *See also Arizona* v. *R*
108 S.Ct. 2093, 2101, 100 L.E.d.2d 704 (198
significance to the fact that the officer wh
interrogation did not know that the resp
quest for counsel); *United States* v. *Porter*
1985) (all officers dealing with accused pr
edge of prior invocation); *United States* v.
1377 (10th Cir.1984); *United States* v. *Sc*
(10th Cir.1983) (once suspect has invoke
that request is imputed to all . . . officers
with suspect"); *White* v. *Finkbeiner*, 687
Cir.1982) (to allow admission of confessio
terrogators were not informed of [a] requ
"be inconsistent with" and "might permi
Edwards). The question posed by the firs
affirmative answer and the knowledge o
States Attorney is thus imputed to Agen

. . . the Court has strongly ind
guards are necessary when *the a*
we now hold that when *an accu*
have counsel present during cu

* * *

We further hold that *an accused*
pressed *his* desire to deal with th
sel, is not subject to further int
(emphasis added).

More recently, in *Arizona* v. *Ro*
2097-8, the Court wrote:

The rule of the *Edwards* case can
admonition that "[i]f *the individu*
torney, the interrogation must ce
sent.

In *Edwards* we ". . . emphasize[d
Miranda and its progeny for the a
to reinterrogate *an accused* in c
serted *his* right to counsel."

* * *

> requirement that interrogation mus
> *cused's* request for an attorney . . ."

Excerpts which emphasize the asserti
sel by the accused can be multiplied alm

Moran v. *Burbine*, 485 U.S. 412, 106
410 (1986) is instructive. The defenda
Miranda rights following his arrest and
waivers, confessed to a murder. He never
during his pre-arraignment interrogation.
tody, his sister attempted to retain a lawye
attorney telephoned the police station an
defendant would not be questioned furt
day. Inculpatory statements were, in fact
during interrogation later that evening. T
Court was whether the conduct of the po
ignorance of the attorney's efforts to reach
sion of his inculpatory statements. The C
required exclusion of the defendant's con
106 S.Ct. at 1141, the Court wrote:

> Events occurring outside of the prese
> entirely unknown to him surely can h
> capacity to comprehend and knowing
> tutional right.

invoked by the individual whose test
475 U.S. at 433, f.n. 4, 106 S.Ct. at 114
are precisely applicable here. In Tor
f.n. 166 following a brief consideratio
author concludes, "In sum, there see
ognize counsel as a surrogate for th
in either fifth or sixth amendment c
recently adopted in this circuit in *Te*
412 (2nd Cir.1988), where, in a Fif
court said:

> Mrs. Terry's attempt to contac
> tute the invocation of Terry's r
> does not show that Terry exerci
> questing that his mother try to
> though "we must give a broad in
> request for counsel" . . . there is
> ment that Mrs. Terry could invo
> half of her son.

Similarly here, there is nothin
Scarpa exercised his right to counse
else try to reach an attorney.

It is important to remember th
presented in the context of pre-arra
is dicta in that case which might sug

depending on the fortuity of whether
ily happens to have retained coun
tion. . . . More importantly, the sugg
of an attorney-client relationship its
tion of the Sixth Amendment misco
purposes of the right to counsel. The
tended function is not to wrap a prot
attorney-client relationship for its ow
is to protect a suspect from the conse
dor. Its purpose, rather, is to assur
prosecutio[n]," . . . the accused shal
devices in facing the "prosecutorial f
ety." . . . By its very terms, it become
the government's role shifts from inve
For it is only then that the asistance
tricacies . . . of law," . . . is needed to
tion's case encounters "the cru
adversarial testing."

The continued viability of that dicta
the light of *Patterson* v. *Illinois*, *supra*, deci
deciding that post-indictment Sixth Amen
can be waived the Court emphasized that
eny preserved "the integrity of an accused
cate with police only through counsel." *E*
were not intended to prevent an accused

sustained its burden of establishin
and intelligently waived his Sixth

While the dictum of the *Patte*
p. 2397 is, at first blush, troubling,
in that dictum is seen to be inapp
note reads in part as follows:

> This does not mean, of cou
> challenges to the conduct of p
> fail whenever the challenged
> tional muster under *Miranda*.
> ted a waiver to stand where
> lawyer was trying to reach h
> Sixth Amendment context, t
> *See Moran* v. *Burbine*, 475 U.
> 1145.

That dictum is inapplicable
rejecting the view that Mr. Benfa
the drive to Camden. I confess to
note observation with the holdin
warnings would suffice to permit
of one's Sixth Amendment right to
bine cited in that footnote. In *Mo*
1144, the Court wrote:

> Because, as *Miranda* holds,
> to remain silent and request

gation room, but that it might h
not to speak at all . . . Because nei
of *Miranda* require this additior
permissible investigatory efforts,
the *Miranda* rules to require the
abreast of the status of his legal

In the light of the foregoing disp
motion, no need is felt to consider th
that the casual and congenial con
Gilbride and Scarpa during the drive f
could not be reasonably construed as
has been defined in *Rhode Island* v. *I*
S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980),
669 F.2d 1231, 1237 (9th Cir.1981) an
696 F.2d 636 (8th Cir. 1983). Nor is the
the extent to which Scarpa himself ini
changes or conversation with Agent C

SO ORDERED.

In the Supren

C

GREGOR

UNIT

ON PETITION F
UNITED
FO

BRIEF FOR THE

Whether petitioner waived his Sixth
right to counsel during post-indictment

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OCTOBER TERM, 1990

No. 89-1856

GREGORY SCARPA, JR., PETIT

v.

UNITED STATES OF AMER

ON PETITION FOR A WRIT OF CERTIO
UNITED STATES COURT OF AP
FOR THE SECOND CIRCU

BRIEF FOR THE UNITED STATES I

OPINIONS BELOW

The opinion of the court of appeal
14a) is reported at 897 F.2d 63. Th
district court (Pet. App. 1b-15b) is
F. Supp. 379.

JURISDICTION

The judgment of the court of app
on February 23, 1990. The petitio
certiorari was filed on May 24, 1990.
of this Court is invoked under 28 U

enterprise, in violation of 18 U.S.C. 1
ing in a continuing criminal enterpri
of 21 U.S.C. 848(a) (1982 & Supp.
spiring to distribute marijuana, in
U.S.C. 846 (1982); distributing mar
lation of 21 U.S.C. 841(a)(1); and
commit extortion and committing exte
tion of 18 U.S.C. 1951. He was sent
of 20 years' imprisonment on the ra
tinuing criminal enterprise, extortion
conspiracy counts, and 5 years' impri
marijuana conspiracy and marijua
counts. All of the prison terms were

1. An indictment returned in
charged petitioner and eight co-de
crimes committed as part of a mari
tion operation headed by petitioner.
defendants were tried jointly and co
ious narcotics and extortion offenses.
the jurisdiction, however, and rema
until he was arrested by Drug Enfor
istration agents at a motel in Lakewo
on August 29, 1988. Pet. App. 3a.

Upon petitioner's arrest, DEA Spe
Gilbride advised petitioner of his M
Petitioner interrupted the agent, sta
stand my rights, you don't have to
Gilbride completed the *Miranda* warn

without any further questioning.

The following day, Agent Gilbr
United States Marshal drove pe
Lakewood jail to the federal court
New Jersey, where he was arraign
fore or during that trip, Joseph B
who had been retained by petitione
that morning, telephoned the Uni
ney's office in Camden. The Assist
Attorney with whom Benfante sp
that petitioner would not be questi
titioner nor the officers who transp
Camden were aware that Benfante
to represent petitioner or that B
tacted the U.S. Attorney's office. P

During the two-hour drive from
den, petitioner and Agent Gilbrid
petitioner's experiences as a fugit
of petitioner's co-defendants. Dur
tion, petitioner repeatedly asked G
who had revealed his whereabouts
fused. Gilbride asked petitioner w
his friends were angry with him
to trial while he was a fugitive. Pe
that his friends were not "like th
were "good guys." He mentioned
defendants had visited him while

informed during the trial. At no
conversation with Gilbride did petit
attorney or indicate in any way that
to talk. Pet. App. 7a-8a.

Prior to trial, petitioner moved
post-arrest statements to Agent
ground that they had been elicited i
Sixth Amendment right to counsel.
denied the motion, holding that the
"more than amply sustained its bur
ing that [petitioner] knowingly
waived his Sixth Amendment rights.
14b. The court ruled that petitioner
he "was going to get a lawyer" was
counsel and that the attempted in
attorney retained by petitioner's fa
knowledge did not invalidate petiti
his right to counsel. *Id.* at 5b-14b.
court concluded that petitioner's S
rights had not been violated.[1]

2. The court of appeals affirmed
14a. In considering whether petiti
his right to have counsel present dur
ing by Agent Gilbride, the court not
had been informed of his *Miranda* ri
indicated that he understood them
was "no suggestion of intimidation

lawyers to represent his underlin
operation, and could easily have
himself before his arrest, he had
do so. The court concluded that p
to speak to Agent Gilbride on
"was confident in his own abilit
enforcement officers and * * * th
suade Gilbride to reveal who ha
Accordingly, the court held that
ingly and intelligently waived his
ance of counsel during the q
10a-11a.

The court also rejected petitio
communication between the law
family and the United States
quired suppression of his subse
Agent Gilbride. Noting that there
that [petitioner] doubted his abi
government agents on his own,"
that the intervention of an attorn
petitioner's knowledge could not
er's waiver of his right to coun
13a.

ARGUMENT

Petitioner renews his contention (Pet. his statements to Agent Gilbride should suppressed because they were elicited in petitioner's Sixth Amendment rights.

The Sixth Amendment guarantees crim ants the right to the assistance of cou post-indictment questioning by law enfo thorities. *Michigan* v. *Jackson*, 475 U.S 630 (1986); *Brewer* v. *Williams*, 430 U (1977); *Massiah* v. *United States*, 377 U 207 (1964). Nothing in the Sixth Amen ever, "prevents a suspect charged with represented by counsel from voluntarily his own, to speak with police in the ab attorney." *Michigan* v. *Harvey*, 110 S 1181 (1990); see *Patterson* v. *Illinois*, 4 291 (1988). Here, the court of appeals trict court agreed that petitioner made and deliberate choice to relinquish his S ment rights and to speak with Agent G his arrest.

Petitioner first contends (Pet. 9-11 waiver was invalid because the police manipulation and slick interrogation te elicit information from him. The facts, h

Petitioner next contends (Pet. 11-13) t
tempted intervention of the attorney that
family retained on his behalf invalidated
waiver of his right to counsel during his c
with Agent Gilbride.[3] Petitioner argues
that the "intervention of any counsel ass
he represents the accused mandates the c
all interrogaton activity" and that "any
waiver of counsel may occur only after t
has had an opportunity to consult with th
This Court's decisions, however, do not su
argument.

The Court held in *Moran* v. *Burbine*,
statements made by an unindicted susp
sponse to police questioning were properly
even though an attorney retained by th
family without his knowledge had contac
lice and been assured that the suspect wo
questioned. 475 U.S. at 421-424. As in th
suspect had been advised of his *Miranda*
had not requested counsel. *Id.* at 415.
concluded that the attorney's attempt to i
the suspect's behalf did not invalidate th
subsequent waiver of his *Miranda* rights,
that "[e]vents occurring outside of the
the suspect and entirely unknown to him

have no bearing on the capacity to con
knowingly relinquish a constitutional r
422.

Two years later, the Court held in
Illinois, *supra*, that an indicted defen
of his *Miranda* rights also served to wa
Amendment right to the assistance of c
police questioning. 487 U.S. at 296-29
expressly rejected the "notion that bec
Amendment right may be involved, it
cult to waive than the Fifth Amendm
part." *Id.* at 297-298. Instead, the C
a "more pragmatic approach to the wai
focusing on "what purposes a lawyer ca
particular stage of the proceedings in c
to determine the scope of the Sixth Am
to counsel and the type of warnings a
that should be required before a waiver
will be recognized." *Ibid.* Because the
during both pre-indictment and post-ind
tioning is "largely limited to advising
to what questions to answer and whic
cline to answer," *id.* at 294 n.6, the Co
that a suspect's valid waiver of his *M*
was also sufficient to waive his Sixth

sought the assistance of counsel.[4] Bu
of appeals noted, "it does not follow u
fifth or sixth amendments that an att
to the defendant may invoke the def
and thereby prevent the defendant
them." Pet. App. 12a. Instead, the
self must exercise those rights by req
ing, or accepting appointment of a la
terson v. *Illinois*, 487 U.S. at 290 n.3
a matter of some significance that pet
retained, or accepted by appointmen
represent him at the time he was qu
thorities."); *Moran* v. *Burbine*, 475 U
("the crucial distinguishing feature o
that Burbine at no point requested t
counsel").[5]

---

[4] In *Moran*, the Court rejected the defenda
ment claim because the questioning that
lenged statements occurred before the "fo
adversary judicial proceedings," 475 U.S. a
that "once the [Sixth Amendment] right *ha*
lows that the police may not interfere wit
defendant's attorney to act as a 'medium
pect] and the State' during the interroga
(quoting *Maine* v. *Moulton*, 474 U.S. 159,

Like the defendants in *Moran* and
tioner did not invoke his Sixth Amen
counsel prior to police questioning. H
tempt to contact or retain an attorney
rest, even though he was aware of the
had been a fugitive for months. After
and advised of his *Miranda* rights, pe
request a lawyer. Instead, he deliber
speak to Agent Gilbride, knowingly a
waiving his Sixth Amendment right to

Petitioner also urges this Court
adopt a "bright-line rule" that a waiv
Amendment right to counsel will be f
there is "an express, affirmative w
right by the accused. This Court, h
fused to require an express waiver
Amendment right to counsel guarante

---

out counsel is a personal right that can b
the defendant himself. As the Court expla

> Preserving the integrity of an accuse
> municate with police only through cou
> of *Edwards* [v. *Arizona*, 451 U.S. 47
> progeny—not barring an accused from
> election as to whether he will face
> during questioning with the aid of cou
> If an accused "knowingly and intellig
> latter course, we see no reason why the

See *North Carolina* v. *Butler*, 441 U
(1979). In rejecting an "inflexible r
plicit waiver can ever suffice," *id.* at
noted that "[e]ven when a right so
that to counsel at trial is involved,
waiver must be determined on 'the
and circumstances surrounding that
the background, experience, and con
cused.'" *Id.* at 374-375 (quoting *Joh*
304 U.S. 458, 464 (1938)). Petitio
that the Court should adopt a more
ard for the waiver of Sixth Amendm
it has for the waiver of Fifth Amend
squarely rejected in *Patterson*:

> While our cases have recognized
> between the Fifth Amendme
> Amendment rights to counsel, ar
> behind these constitutional guar
> never suggested that one right i
> "greater" than the other, nor is
> port in our cases for the notion
> Sixth Amendment right may be
> more difficult to waive than the
> ment counterpart.

487 U.S. at 297-298.

CONCLUSION